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In The

Supreme Court of The United States

OCTOBER TERM, 1973

No. 73-1969

WILLIAM WINKLE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

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ATTORNEYS FOR PETITIONER

JUNE 28, 1974

INDEX

Page

OPINION BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 11

APPENDIX A OPINION BELOW A-1

LIST OF AUTHORITIES

CASES

Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) 9

Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 11 L.Ed.2d 604 (1964) 9

Berger v. State of New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967) 8

Bloom v. Florida, 283 So.2d 134 (Fla.D.C.App. 1973) 10

Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886) 8

Byars v. United States, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927) 8

Commonwealth v. Todisco, 294 N.E.2d 860 (Mass. 1973) 11

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) 8, 9

Ellison v. State, 212 S.W.2d 387 (Tenn.App. 1948) 11

Entick v. Carrington, 19 How. St.Tr. 1029 (1765) 7

Frey v. State, 237 A.2d 774 (Md.Ct.Spec.App. 1968) 11

Fry v. United States, 9 F.2d 38 (9th Cir. 1925) 11

Go Bart Importing Co., et al v. United States, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931) 8

Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921) 8

Lowrey v. United States, 161 F.2d 30 (8th Cir. 1947) *cert. denied* 331 U.S. 849 (1947) 10

Malone v. State, 147 Tex.Crim. 433, 181 S.W.2d 281 (1944) 10

Marcus v. Search Warrants of Property at 104 East Tenth Street, Kansas City, Missouri, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961) 8

Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927) 7

McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948) 9

Miller v. State, 134 Tex. Crim. 118, 114 S.W.2d 244 (1938) 11

Moore v. United States, 461 F.2d 1236 (D.C.Cir. 1972) 11

New Jersey v. Muldowney, 60 N.J. 594, 292 A.2d 26 (1972) 10

Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946) 8

Phenix v. State, 488 S.W.2d 759 (Tex.Cr.App. 1972) 11

Spinelli v. United States, 393 U.S., 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) 9

Stanford v. Texas, 379 U.S. 476, 85 U.S. 506, 13 L.Ed.2d 431 (1965) 8

United States v. Gomez, 42 F.R.D. 347 (S.D.N.Y. 1967) 11

United States v. Kaye, 432 F.2d 647 (D.C. Cir. 1970) 10

United States v. Marti, 421 F.2d 1263 (2nd Cir. 1970) 8, 9, 10

United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971) 11

United States v. Wroblewski, 105 F.2d 444 (7th Cir. 1939) 10

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND.IV 2, 3

U.S. CONST. AMEND. XIV §1 3

TEX. CONST. ART. 1 §9 3

STATUTORY PROVISIONS

TEX. PENAL CODE ANN. art. 1183 *et seg.* (1961) 3

28 U.S.C. §1257(3) 2

In The

Supreme Court of The United States

OCTOBER TERM, 1973

WILLIAM WINKLE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

Petition for a Writ of Certiorari
To the Court of Criminal Appeals of Texas

William Winkle, petitioner before this Court, appellant before the Court of Criminal Appeals of Texas, Nos. 47,393 and 47,394, and defendant in cause numbers C72-3789-I and C72-3788-I in Criminal District Court No. 2, Dallas County, Texas, respectfully prays that a Writ of Certiorari issue to review the opinion of the Court of Criminal Appeals of Texas, which affirmed petitioner's conviction for rape.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas (Appendix A, R. 535-543)[1] is reported at 506 S.W.2d 891 (Tex. Cr. App. 1974).

JURISDICTION

The opinion of the Court of Criminal Appeals of Texas was delivered on March 13, 1974. A Motion for Leave to File a Motion for Rehearing, timely filed, was denied on April 3, 1974, and on April 5, 1974, (R. 614-626) the mandate issued. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

QUESTIONS PRESENTED

1. Is a search warrant that describes the "things to be seized" as implements of the offense of Rape in violation of the Fourth Amendment to the United States Constitution?

2. May a constitutionally defective warrant, which does not particularly describe the things to be seized, be cured by the officer's affidavit, even though the affidavit was not physically attached to the warrant and the warrant did not incorporate the affidavit by reference?

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[1]Uniform pagination appears at the lower right hand corner of each page in the certified record that is before this Court.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The U.S. CONST. AMEND. IV provides in pertinent part as follows:

> "* * * no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing* the place to be searched, and the persons or *things to be seized.*" (emphasis added)

The U.S. CONST. AMEND. IV provides in pertinent part as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *"

TEX. CONST. art. 1 §9 provides in pertinent part as follows:

> "* * * no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, * * *"

The TEX. CODE OF CRIM. PROC. ANN. ART. 18.13(3) provides in pertinent part as follows:

> "That it describe, as near as may be, * * * the implements alleged to be there kept for the purpose of aiding in the commission of offenses, * * *"

STATEMENT OF THE CASE

The petitioner was indicted and tried before a jury in two cases arising out of the same transaction for the crime of rape (R. 4).[2] The jury found petitioner

[2]TEX. PENAL CODE ANN. Art. 1183 *et seq.* (1961).

guilty and set punishment at life (R. 44,50,52). Both cases were affirmed by the Court of Criminal Appeals of Texas (Appendix A, R. 535-543).

The testimony of the complainants (R. 63-224) was not corroborated. The examining physician testified that he found no trauma indicating intercourse (R. 314). The opinion below acknowledged that the complainants' outcry was delayed by several hours and the complainants lied concerning their whereabouts on the night in question (R. 138,142,537). The only evidence that tended to support the complainants' testimony was the introduction into evidence of two knives (States Exhibits one and two, R. 271) that were allegedly used to frighten the complainants.

The knives were seized in a search of petitioner's home in absence of petitioner pursuant to a search warrant (R. 477). The warrant was obtained from a local magistrate after presentation of a sworn affidavit (R. 476). The warrant described the things to be seized as "implements* * * for the purpose of aiding in the commission of the offense of Rape." (R. 477). The affidavit was not attached to the warrant and the warrant did not incorporate the affidavit by reference. The same officer that prepared and presented the affidavit executed the warrant within thirty minutes after the warrant was issued by the magistrate (R. 245,249).

How the Federal Question was Raised and Passed Upon

Prior to the trial petitioner filed a motion to suppress (R. 18) requesting a hearing outside the presence of the jury on the admissibility of any evidence obtained as the result of a search of petitioner's house. During the trial, a hearing was held on the motion outside the presence of the jury (R. 244-259). At this hearing Detective Cranford testified that he searched petitioner's residence pursuant to a search warrant that was issued by a magistrate (R. 245-251). Petitioner offered for the record only the affidavit and search warrant (State's Exhibits three and four, R. 248). Petitioner made strenuous objection to the search warrant's failure to particularly describe the things to be seized in violation of the Fourth Amendment (R. 251-259, 270-271). The objection to the evidence was overruled (R. 256).

Subsequently petitioner was convicted and appealed to the Court of Criminal Appeals of Texas. By briefs and oral argument petitioner raised the questions herein presented (R. 547-550).

The lower court's opinion discussed petitioner's contention involving the search warrant but made no reference to the Fourth or Fourteenth Amendments to the United States Constitution. The opinion below justified the action of the trial court on the basis that the officer who filed the affidavit executed the warrant within thirty minutes. In addition the opinion below stated that the executing officer was

"armed with the warrant *and affidavit*" when the search was made (R. 538). *This fact does not appear in the record.*

Thereafter petitioner filed a motion for rehearing which attacked the portion of the opinion below dealing with the search warrant (R. 615-621). Petitioner's motion was denied on April 3, 1974.

REASONS FOR GRANTING THE WRIT

The questions presented in this case are of great importance and deserve the attention of this Court for the following reasons:

1. The opinion below authorizes the use of a general warrant that does not particularly describe the "things to be seized";

2. The opinion below, if it is allowed to stand, destroys the judicial function of a neutral magistrate in the issuance of search warrants; and

3. The decisions of the lower courts are in conflict as to the extent, if any, to which an officer's affidavit may cure a general warrant.

These reasons will be presented in separate sections below.

I.

The opinion below authorizes the use of a general warrant that did not particularly describe the "things to be seized".

The search warrant in question (R. 477) described the things to be seized in the following manner:

> "* * * a place where implements are kept for the purpose of aiding in the commission of an of-

> fense as defined by the Penal Code of the State of Texas, to-wit: Rape.
>
> You are therefore commanded to forthwith search the place above named and described where implements, such as are above named, are kept for the purpose of aiding in the commission of the offense of Rape * * *."

The court below admitted that the description of the "things to be seized" was defective, but held that the officer's affidavit sufficiently described the implements as "two knives". The affidavit, however, was not attached to the warrant nor was it incorporated by reference in the warrant. The lower court attempted to justify its holding by the fact that the same officer who obtained the warrant executed it within thirty minutes after its issuance (R. 538). In addition the lower court stated that the knives were found exactly where the affidavit had described. Finally, the lower court placed importance on the alleged fact that the executing officer had a copy of the affidavit in his possession at the time of execution. The latter does not appear in the record at any point.

The general warrant was condemned as early as 1765 in the decision of *Entick v. Carrington*, 19 How.St.Tr. 1029 at 1073-1076. The decisions of this Court also condemn the general warrant by requiring that "the things to be seized" must be particularly described on the search warrant itself. In *Marron v. United States*, 275 U.S. 192, 196 (1927) this Court held that general search warrants are fundamental violations of the Fourth Amendment and that "as what is

to be taken, nothing is left to the discretion of the officer executing the warrant." *Boyd v. United States,* 116 U.S. 616, 624 (1886).

In *Oklahoma Press Pub. Co. v. Walling,* 327 U.S. 186, 209 (1946) this Court held that the term "particularly describing the things to be seized is 'literally applicable to warrants'." *See Go Bart Importing Co., et al v. United States,* 282 U.S. 344 (1931).

In this Court's recent decision of *Coolidge v. New Hampshire,* 403 U.S. 443, 471 (1971) it is stated:

> "If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of 'warrants * * * particularly describing * * * [the] things to be seized'."

See Mr. Justice Black's concurring opinion in *Marcus v. Search Warrants of Property at 104 East Tenth Street, Kansas City, Missouri,* 367 U.S. 717, 738 (1961). See also *Stanford v. Texas,* 379 U.S. 476, 481-485 (1965); and *Berger v. State of New York,* 388 U.S. 41, 53 (1967).

In addition it is settled that neither the fruits of the search nor the manner in which the search is conducted will cure a constitutionally defective warrant, *Byars v. United States,* 273 U.S. 28, 29 (1927) and *United States v. Marti,* 421 F.2d 1263, 1267-1268 (2nd Cir. 1970). *See also Gouled v. United States,* 255 U.S. 298 (1921).

II.

The opinion below, if it is allowed to stand, destroys the judicial function of a neutral magistrate in the issuance of a search warrant.

This Court requires a neutral magistrate to determine that probable cause exists based on an officer's affidavit before the magistrate issues a search warrant. *See McDonald v. United States,* 335 U.S. 451, 455-456 (1948); *Aguilar v. Texas,* 378 U.S. 108 (1964); and *Spinelli v. United States,* 393 U.S. 410 (1969). Once the determination of probable cause is made the magistrate may limit the scope of the search, *United States v. Marti,* 421 F.2d 1263, 1268 (2nd Cir. 1970). When the magistrate issues a warrant it is an order of the court and it must stand on its own terms. If, however, a constitutionally defective search warrant (court order) may be cured by the affidavit, then the safeguard of a neutral magistrate between the police and society is effectively removed. *Beck v. Ohio,* 379 U.S. 89 (1964). *See Coolidge v. New Hampshire, supra.*

III.

The decisions of the lower courts are in conflict as to the extent, if any, to which an officer's affidavit may cure a general warrant.

The lower courts are divided on this issue as follows: (1) The affidavit may not be considered because

the Fourth Amendment requires that the warrant particularly describe the things to be seized: (2) The affidavit may be considered only if it is incorporated by reference and physically attached to the warrant; or (3) The affidavit may be referred to in construing a search warrant without incorporation or physical attachment.

The cases in the first category hold that there is a fundamental difference between the warrant and the affidavit, that the affidavit is merely evidence presented to the magistrate, and that the affidavit can not be constitutionally used to limit the scope of or cure a defective warrant. The best examples of these cases are *New Jersey v. Muldowney,* 60 N.J. 594, 292 A.2d 26, 28 (1972);[3] *United States v. Kaye,* 432 F.2d 647 (D.C. Cir. 1970); *United States v. Marti, supra; Lowrey v. United States,* 161 F.2d 30 (8th Cir. 1947) *cert. denied* 331 U.S. 849 (1947); *Malone v. State,* 147 Tex.Crim. 433, 181 S.W.2d 281 (1944); *United States v. Wroblewski,* 105 F.2d 444 (7th Cir. 1939).

The cases in the second category hold that the affidavit may be used to limit the scope or cure a defective search warrant only if the affidavit is physically attached to the warrant and the search warrant incorporates the affidavit expressly with suitable words. The best cases in this category are *Bloom v. Florida,* 283 So.2d 134, 135-136 (Fla.Dist.Ct.App.

[3]The warrant in this case is almost identical to the warrant in the case at bar in that the warrant in this case directs the executing officer to seize property used in the commission of the crime of obscenity.

1973); *Moore v. United States,* 461 F.2d 1236, 1237-1238 (D.C.Cir. 1972); *Phenix v. State,* 488 S.W.2d 759, 764 (Tex.Cr.App. 1972); *Frey v. State,* 237 A.2d 774 (Md.Ct.Spec.App. 1968); *Ellison v. State,* 212 S.W.2d 387 (Tenn.App. 1948); *Miller v. State* 134 Tex.Crim.118, 114 S.W.2d 244 (1938).

In the last category are opinions that hold that the officer's affidavit may be used without any specific requirement of incorporation by reference or physical attachment to supplement the search warrant. Some of these cases are *Commonwealth v. Todisco,* 294 N.E.2d 860 (Mass. 1973); *United States v. Gomez,* 42 F.R.D. 347 (S.D.N.Y. 1967); *United States v. Sklaroff,* 323 F.Supp. 296 (S.D.Fla. 1971); and *Fry v. United States,* 9 F.2d 38 (9th Cir. 1925).

CONCLUSION

For the reasons that the opinion below is in direct conflict with the Fourth Amendment to the Constitution of the United States; that the effect of the opinion below is to remove the magistrates' power to limit the scope of search warrants; and that the lower courts are divided as to the use of affidavits to cure general warrants this petition for writ of certiorari should be granted on both questions presented.

Respectfully submitted,

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APPENDIX A

THE OPINION BELOW

William WINKLE, Appellant,
v.
The STATE of Texas, Appellee.
Nos. 47393, 47394.
Court of Criminal Appeals of Texas.
March 13, 1974.
Rehearing Denied April 3, 1974.

OPINION

ONION, Presiding Judge.

These appeals are from convictions for rape, in a single trial, wherein the punishment was assessed by the jury at life in each case.

[1, 2] At the outset we shall consider appellant's complaint that he was arraigned in both cases in the presence of the jury. This court has repeatedly stated that the practice of conducting arraignment in the presence of the jury should not be condoned, and trial courts should be careful to avoid such practice. Minafee v. State, 482 S.W.2d 273, 276 (Tex.Cr.App.1972); Stewart v. State, 473 S.W.2d 495, 496-497 (Tex.Cr.App.1971); Thompson v. State, 447 S.W.2d 920, 922 (Tex.Cr.App.1969). In the instant case, however, as in Stewart, there was no objection to the arraignments being conducted in the jury's presence and we find no reversible error.

Next, appellant challenges the sufficiency of the evidence to sustain the convictions.

On the evening of March 18, 1972, the 18-year old prosecutrixes, A__ and V__, were driving to a miniature golf course in Dallas after being denied admittance at Lou Ann's because they were unescorted when a car driven by Jack Gamble and containing the appellant and Joe Gamble pulled alongside and motioned for them to stop. The girls complied with the request of the unknown trio and, after a short conversation, the girls were invited to a party and agreed to go. The appellant and Joe Gamble got into V__'s car and gave directions to Joe Gamble's house, while Jack Gamble left in the other car to pick up his date.

The group drove to a house located in the Pleasant Grove area of Dallas County and upon entering, began to listen to music, strum the guitar and play with some puppies. Later, Jack Gamble arrived with his date, changed his shirt and announced he and his date were not staying. At this point A__ and V__ decided to leave, but discovered that V__'s car would not start. The appellant and Joe Gamble worked on the car, but were not successful and the girls were persuaded to come back into the house and let the motor "cool." After some discussion about calling a mechanic, the appellant and Joe Gamble drew butcher knives, pushed the girls into a bedroom and ordered them to undress. The appellant and Gamble then had numerous acts of sexual intercourse with each girl,

performed rectal sodomy on the girls and forced them to perform acts of oral sodomy, and then forced the girls to commit oral sodomy upon each other. These acts took place over a three or four hour period.

After the girls had been allowed to dress, Jack Gamble returned from his date and V__ related she told him what had transpired. Subsequently, one of the men repaired V__'s automobile and the girls were permitted to leave after being threatened they would be killed if they told what had happened and after they promised to remain silent.

About 5 a.m. the girls arrived at A__'s home in Mesquite and told A__'s mother they had been at the house of V__'s sister, but came home because the people at the sister's house had been called out of town. Upon awakening at 8:30 a.m., the girls related to A__'s mother they had been raped. The police were called. They pointed out the house in question to the police and were taken to the hospital for an examination.

The appellant did not testify, but called Jack Gamble, who testified that he returned to the house after 3 a.m. and found the girls fully clothed and that, after a short discussion with V__, she went with him to the living room, where he pulled out a hideaway bed, laid on it with V__, kissing and was "starting to make out" when A__ came in and said she and V__ had to leave.

[3] Dr. Robert Gardner, a defense witness, testified that he examined both girls and found no signs of trauma, bleeding, nor observed any anal irritation in either girl. He related he failed to find any evidence of sperm in their vaginas. The girls had testified that neither man had reached a climax during the numerous sex acts.

In rebuttal A__'s mother testified the doctor had told her he had found evidence of sexual intercourse.

It is appellant's contention that since the prosecutrixes' stories were severaly impeached by the examining physician, and other facts, their testimony is not worthy of belief.

The prosecutrixes repeatedly testified that appellant had penetrated their private parts with his male organ. They were in the same room and corroborated each other's testimony. Although the examining physician expressed an opinion inconsistent with that of forcible rape, the jury was at liberty to believe any part of the testimony and reject the remainder.

It is true that the girls did not make an immediate outcry upon return to A__'s home, but they explained they were scared because of the threats upon their lives and were not sure what to do, and delayed their outcry for several hours.

The jury observed the witnesses, passed on their credibility, and chose to believe the girls' explanation, and this court should not disturb the verdict where the same is based on probative evidence. 48

Tex.Jur.2d, Rape, Sec. 77, p. 426; Blackmon v. State, 87 Tex.Cr.R. 173, 220 S.W. 93 (1920); Barry v. State, 165 Tex.Cr.R. 204, 305 S.W.2d 580 (1957).

Viewing the evidence in the light most favorable to the jury's verdict, as we are required to do, we deem it sufficient to sustain the convictions.

Next, appellant contends the trial court erred in permitting two butcher knives to be introduced into evidence, as they were seized under a defective search warrant.

The record reflects that Dallas Police Officer Jack Cranford talked to the prosecutrixes and learned that the butcher knives used had been placed in a dresser drawer in the bedroom where the offenses took place. Thereafter he filed a search warrant affidavit seeking a warrant to search for implements kept for the purpose of aiding in the commisison of an offense, to-wit: rape and described such implements as "knives." The search warrant was issued and the affiant-officer and others went to the house in question and searched the dresser drawer and found the butcher knives which were introduced, over objection, into evidence.

Appellant contends that the search warrant is defective because it does not describe the implements to be searched for as "knives." The warrant authorized the officers to search the place described "where implements, *such as are above named,* are kept for the purpose of aiding in the commission of the of-

fense of Rape and if you find there any such implements, you will seize the same ...." Appellant argues that implements were not "above named" or described and the warrant did not comply with the provisions of Article 18.13(3), Vernon's Ann.C.C.P., which provides, among other requisites of a search warrant,

> "That it describe, as near as may be, the property supposed to be commonly concealed in such suspected place, or the implements alleged to be there kept for the purpose of aiding in the commission of offenses, and state the particular offense for which such implements are designed."

In the instant case the record reflects that within 30 minutes after the affiant-officer Cranford had obtained a search warrant he searched the house in question for the knives, finding the same exactly where they were described as being. There was no general or exploratory search for any other type of implements.

[4, 5] It is clear that Article 18.13(3), supra, was designed to inform the officers executing a warrant what implements to search for. In the instant case the officer who had made the affidavit, armed with the warrant and affidavit which described the implements as "knives," made the search. While the search warrant should have described the implements, we perceive no reversible error under the circumstances. Cf. Phenix v. State, 488 S.W.2d 759

(Tex.Cr.App.1972); Johnson v. State, 469 S.W.2d 581 (Tex.Cr.App.1971).

Further, it is observed that, prior to introduction of the knives into evidence, both prosecutrixes testified, without objection, that the knives appeared to be the same ones used by the appellant and Joe Gamble.

The ground of error is overruled.

[6] Appellant also complains of the trial court's action in permitting the prosecutor to inquire of Jack Gamble, a defense witness, about extraneous offenses committed by the appellant.

On cross-examination Gamble was asked that if the appellant had told the girls "he had been up for rape before," would it be a true statement. A number of objections ensued and were overruled. Finally, the witness admitted that of his own personal knowledge he knew that appellant had been convicted of rape.

When the first question was asked, appellant's objection was that it was "highly prejudicial." At no time was the trial court's attention directed to the complaint now raised on appeal that the prosecutor was improperly seeking to elicit evidence of extraneous offenses. While the questions were improper under the circumstances, appellant's general objection was not sufficient to preserve the matter for review.

[7] Appellant also complains that Gamble was also asked if "the other girls that he (the appellant) has

raped, he has never had a climax?" The objection "that is an assumption of fact" was sustained and appellant failed to pursue his request for a jury instruction to disregard until he obtained a ruling. Nothing is presented for review. See Hicks v. State, 493 S.W.2d 833 (Tex.Cr.App.1973).

[8] Appellant also complains of questions directed to Gamble inquiring if he had seen appellant with a girl named C_ A_ S_, who had a five months old baby and a woman named W_ B_ H_. The witness denied both instances before a general objection was interposed. Nothing is presented for review.

Next, appellant complains of the trial court's failure to respond to the following written objection to the charge at the guilt stage of the trial:

> "That the trial court *has* in its charge has failed to properly limit certain evidence dealing with another conviction for this defendant and the facts and circumstances surrounding such alleged offense."

[9] The written objection fails to clearly point out just what testimony it had reference thereto and what type of limitation was desired. Apparently it has reference to a prior rape conviction, but it is here noted that the prosecutrixes testified that the appellant had threatend them, told them he had been convicted and was on probation for rape, and further that he had raped another girl whom he had killed. This testimony was clearly admissible and not sub-

ject to any type of limiting charge.[1] In his appellate brief appellant contends the written objection to the charge was addressed to the testimony of Jack Gamble above described, and argues that such testimony of an extraneous offense or offenses should have been limited to the issues of intent, identity, or for whatever reason it was admitted, not surrendering his contention that the same was not admissible in the first place. As noted earlier, the elicitation of the testimony from Jack Gamble concerning the prior conviction was improper, but the appellant did not properly preserve his error.

[10] Under the circumstances, we cannot agree the court failed to respond to the written objection to the court's charge and limit the testimony to some issue for which it was not admitted or admissible. No error is presented. See Article 36.19, Vernon's Ann.C.C.P.

Appellant's next complaint relates to statements made by the prosecutor during the argument, which, according to appellant, commented on his failure to testify.

One such incident occurred and involved the following colloquy:

"MR OVARD: Now think about the girls for a moment. Think what you have to go through when you are a victim of a rape case. I really don't blame the girl, or a woman that doesn't go through

[1]Welch v. State, 373 S.W.2d 497, 500 (Tex.Cr.App.1964).

with it, because here's what you have to do, and you heard it from the stand. First, you have got to go to the Police, and you go before an experienced investigator who talks to you. He makes a determination because in this case he talked to both the girls, he talked to this Defendant, he talked to the other Defendant before he filed the case of rape. That's the first thing they have to do."

Such argument was objected to on the ground that the prosecutor was commenting on appellant's failure to take the stand.

Article 38.08, Vernon's Ann.C.C.P., prohibits allusion to or comment upon the failure of an accused to testify in his own behalf. See Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

[11] As stated in Yates v. State, 488 S.W.2d 463 (Tex.Cr.App.1972), for there to be reversible error because of a comment on the failure of the accused to testify, the language used must be looked to from the standpoint of the jury, and the implication that the language used had reference to an accused's failure to testify must be a necessary one. Further, it is not sufficient that the language might be construed as an implied or indirect allusion thereto. See Lipscomb v. State, 467 S.W. 2d 417 (Tex.Cr.App.1971); Ramos v. State, 419 S.W.2d 359 (Tex.Cr.App.1967).

[12] The prosecutor's argument, when taken in the context in which it was made, does not reflect that it was a comment upon the appellant's failure to testify.

Appellant's contention is without merit.

Lastly, we shall consider appellant's contention that the court erred in overruling his objection to the prosecutor's comment on the failure to call the co-defendant Joe Gamble.

The argument complained of is as follows:

"... there were only four people out there in that bedroom, those two girls who we brought down to testify before you, this Defendant, who sits here and his friend, Gamble, who (sic) you didn't get to hear testify. I wonder why?"

The objection that it was an improper comment was overruled. Over further objection the prosecutor pointed out Gamble was a friend of the appellant and a principal.

[13] We start with the observation that the prosecution has the right to comment on the accused's failure to call competent and material witnesses. Miller v. State, 458 S.W.2d 680, 683 (Tex.Cr.App.1970) and cases there cited. See also Batiste v. State, 462 S.W.2d 30 (Tex.Cr.App.1971); Joines v. State, 482 S.W.2d 205 (Tex.Cr.App.1972); Rodgers v. State, 486 S.W.2d 794 (Tex.Cr.App.1972).

[14] A co-defendant is now a competent witness for either the State or the accused. See Article 36.09, Vernon's Ann.C.C.P. See also Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Overton v. State, 419 S.W.2d 371 (Tex.Cr.App.1967); Ex parte

Pennington, 471 S.W.2d 578 (Tex.Cr.App.1971) and cases there cited.

[15] Formerly, a prosecutor's comment in jury argument on a defendant's failure to call a co-defendant as a witness was reversible error since the former statutes (Article 711, Vernon's Ann.C.C.P.1925, and Article 82, Vernon's Ann.P.C.) rendered the co-defedant incompetent as a witness. See, i.e., Landers v. State, 63 S.W. 557 (Tex.Cr.App.1901); Ramirez v. State, 112 Tex.Cr.R. 332, 16 S.W.2d 814 (Tex.Cr.App.1929); Grille v. State, 112 Tex.Cr.R. 561, 17 S.W.2d 833 (1929); Clayton v. State, 139 Tex.Cr.R. 86, 138 S.W.2d 1084 (1940). Those statutes are no longer viable in light of the 1965 Code of Criminal Procedure and the decision in Washington v. Texas, supra.

Appellant's contention is overruled.

Finding no reversible error, the judgments are affirmed.

ODOM, J., concurs in this result.



SUPREME COURT, U. S.

FILED

AUG 19 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1969

WILLIAM WINKLE,

Petitioner

V.

STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals
Of The State Of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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SUBJECT INDEX

Page

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2

ARGUMENT AND AUTHORITES 6

CONCLUSION 14

PROOF OF SERVICE 15

INDEX OF AUTHORITIES

CASES *Page*

Gurleski v. U. S., 405 F.2d 253
(5th Cir. 1968) 9

Hamilton v. U. S., 433 F.2d 526
(D. C. Cir. 1970), cert. den.
400 U. S. 944 11

Harried v. U. S., 389 F. 2d 281
(D.C. Cir. 1967) 9, 11

Harris v. U. S., 331 U. S. 145 (1947) 8, 10, 13

Johnson v. U.S., 293 F. 2d 539
(D. C. Cir. 1961), cert. den.
375 U. S. 888 10

Kenny v. U. S., 157 F.2d 442
(D. C. 1946) 11

Ludwig v. Wainwright, 434 F.2d 1104
(5th Cir. 1970) 9, 10

Maryland Penitentiary v. Hayden,
387 U. S. 294 (1967) 10

U. S. v. Alloway, 397 F.2d 105
(6th Cir. 1968) 9

U. S. v. Beigel, 254 F.Supp. 923
(S. D. N. Y. 1966), aff'd 370 F. 2d
751, cert. den. 387 U. S. 930 13

U. S. v. Curwood, 338 F. Supp. 1104
(D. Mass. 1972) 11

INDEX OF AUTHORITIES - Continued

CASES *Page*

U. S. v. DePugh, 452 F.2d 915 (10th Cir. 1971) 11

U. S. v. Gomez, 42 FRD 347 (1967) 11

U. S. v. Guido, 251 F. 2d 1 (7th Cir. 1958) 9

U. S. v. Hassell, 427 F.2d 348 (6th Cir. 1970) 11

U. S. v. Melancon, 462 F. 2d 82 (5th Cir. 1972) 11

U. S. v. Munroe, 421 F. 2d 644 (5th Cir. 1970), cert. den. 400 U. S. 851 ..... 10, 11

U. S. v. Nolan, 413 F.2d 850 (6th Cir. 1969) 9, 10

U. S. v. Nolan, 416 F. 2d 588 (10th Cir. 1969) .....

U. S. v. Rabinowitz, 339 U. S. (56 (1950) 9, 13

U. S. v. Robinson, 287 F. Supp. 245 (N.D. Ind. 1968) 9, 13

U. S. v. Tranquillo, 300 F. Supp. 871 (M. D. Fla. 1971) 10, 11

U. S. v. Ventresca, 380 U. S. 102 (1965) 8

Vinta Products Co. v. Goddard, 43 F. 2d 399 (D. C. Minn. 1930) 11

OTHER AUTHORITIES

U. S. CONSTITUTION

Fourth Amendment 8, 9, 11

Fourteenth Amendment 11

NO. 73-1969

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

William Winkle,

Petitioner

V.

State of Texas,

Respondent

On Petition For Writ of Certiorari
To The Court Of Criminal Appeals
Of The State Of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at 506 SW 2d 891 (Tex. Crim. App. 1974), and is reproduced in Petitioner's Petition.

JURISDICTION

The jurisdictional requisites would appear to be adequately set forth in the petition although Respondent disputes Petitioner's contention that any rights guaranteed by the United States Constitution have been denied.

QUESTIONS PRESENTED

Petitioner advances two questions which Respondent believes do not represent the real issue. The following question is submitted by Respondent:

1. Were Petitioner's Fourth Amendment rights violated requiring reversal when the state court admitted into evidence two knives tht had been used in the commission of the crime of rape and which were seized during a reasonable search pursuant to a search warrant issued upon probable cause authorizing seizure of the implements of the rape?

STATEMENT OF THE CASE

Petitioner was indicted (R. 4) in two cases of rape. The jury found Petitioner guilty and set punishment at life (R.44-47, 52). After sentencing, Petitioner gave notice of appeal. The Texas Court of Criminal Appeals affirmed Petitioner's convictions (Appendix "A" to Petitioner's Petition).

Evidence at the trial on the merits shows that on March 18, 1972, at approximately 10:00 or 10:30 P.M. the two 18 year old prosecutrixes were driving to a miniature golf course in Dallas, Texas, (R.64, 65, 150-152). Petitioner and two other males drove their car alongside and motioned for the girls to stop, which they did. Petitioner and the two other males were unknown to the girls. After a brief conversation the girls were asked to go to a party. (R.66-68, 152-154). One of the males then left in his car to pick up his date, leaving Petitioner and the other male with the girls.

The girls were directed by Petitioner and his male companion and drove them to a house in Dallas where the girls were invited inside.(R.69, 155). When the group entered the house, they listened to music and played with some puppies. (R.70, 71, 155, 156). Shortly thereafter, the other male who had previously departed to pick up his date, arrived at the house with his date, changed his shirt, and advised the others that he and his date were not staying and departed. (R.71, 72, 156).

The girls also decided to leave and attempted to do so when they discovered their car would not start. (R.72, 157). Petitioner and his male companion indicated they could fix it, and the car was pushed around into the garage where they said they had their tools and some light (R.73, 74, 158). They were unable to start the car, and they all returned to the house (R.159). Upon returning to the house one of the girls attempted to call a mechanic friend, but the phone did not work (R. 75, 159, 160).

After some conversation as to what to do about the car, Petitioner and his companion each pulled out knives that appeared to be butcher of kitchen knives and ordered the girls into one of the bedrooms in the house (R.77, 78, 160). The girls were frightened, and Petitioner and his companion ordered both girls to undress and ordered one to lay on the bed and the other to lay on the floor (R.82, 161, 163). They were still holding the knives on the girls and threatened to kill them if they did not comply (R.81, 162). The girls were frightened and complied.

Over the next several hours, Petitioner and his companion had intercourse several times with each of the girls (R.83, 163), committed rectal sodomy (R.86, 87), forced the girls to commit oral sodomy on them (R. 86, 166, 168), and forced the girls to commit oral sodomy on each other (R. 86-89, 168).

The girls pleaded to leave and said they would not tell anyone if they let them go. Petitioner said he could not believe them and that they might have to be killed (R. 92, 93, 169, 170). About that time the third male who previously departed with his date, returned to the house (R. 94, 171). Petitioner and his companion put the knives in the top dresser drawer in the bedroom (R. 94, 95). One of the girls talked to this third male that arrived and related to him what had happened (R. 95, 171). The girls car was fixed and they were told to leave (R. 96, 97, 172).

The girls left and went to one of their houses, arriving about 5:00 A.M. (R. 173). That morning about 8:30 A.M., they related to the girl's mother that they had been raped (R. 97, 98, 173), and the police were called. The girls directed the police to the house where the assualts occurred. When the police arrived at the house, Petitioner and the other two males were there (R. 174, 229). The police were invited in the house and Petitioner was taken into custody (R. 232-235).

Officer Cranford of the Dallas police interviewed the girls, and learned that the knives used by Peitioner and his companion were put in a dresser drawer in the bedroom where the assaults took place (R. 143). Based on the information received, officer Cranford on March 20th submitted his affidavit for search warrant to Judge Cole and obtained a search warrant (R. 245, 476, 477).

Within 30 minutes after obtaining the search warrant, officer Cranford personally went to the place described in the warrant, being the same place where the offenses occurred, looked for the knives in the exact place described by the girls and the place contained in his affidavit, and found two knives there (R. 249, 271). The dresser in the bedroom was the only place searched, and there was no search of any other part of the house (R. 272). The two knives were the only items taken by officer Cranford and no general or exploratory search was conducted.

During the trial, each of the girls testified and, without objection, testified that the two knives obtained from the house by Officer Cranford appeared to be the same knives used by Petitioner and his companion during the assaults (R. 79, 161). The knives were later admitted into evidence over Petitioner's objection (R. 271).

Both girls identified Peitioner as being one of the males that committed the offenses against them (R. 85, 165).

ARGUMENT and AUTHORITIES

Officer Cranford interviewed the two girls and was told of the offenses committed. He was also advised as to where the offenses took place and the fact the culprits used knives in the commission of the offenses and that the knives were last seen in the dresser drawer in the bedroom where the offenses occurred.

Armed with this information, Officer Cranford proceeded to a magistrate to secure a search warrant to search for the two knives. His affidavit to the magistrate (R. 476) set forth probable cause and specifically describe the house and the place therein to be searched and described the things to be seized as knives placed in a dresser drawer in the front bedroom on the west side of the house.

This affidavit furnished probable cause and specificity for the magistrate to issue a search warrant

and Petitioner does not question this in this petition. The magistrate did issue a search warrant for the specific address and directed a search for implements, such as above named, of the commission of the offense of rape. Although the implements (such as above named) were not described as "knives" in the warrant itself, they were described as such in the affidavit and "such as above named" would have reference to that affidavit.

Officer Cranford, who made the affidavit, executed the warrant at the address named. He was personally aware that a specific place was to be searched (dresser drawer in front bedroom), and was aware that specific items were to be seized (knives).

Officer Cranford executed this warrant within thirty minutes after it was issued. He went to the specific address and searched only the dresser drawer in the specific bedroom and recovered two knives as described. No other place and no other part of the house was searched. This was not a general or exploratory search, but was a specific search for specific items and authorized by the warrant.

The only attack Petitioner makes to this search is that the warrant itself did not include the words "knives" when it was describing the items to be seized, although a neutral magistrate had considered the affidavit which established probable cause to search for knives in the dresser drawer, and issued a warrant for that purpose. This is not a situation where other premises were searched or items other than the ones

intended to be seized were seized, but is a situation where a specific search was conducted to seize specific items pursuant to a warrant from a neutral magistrate based upon probable cause.

To sustain Petitioner's contention would mean the subject search would be declared illegal because the warrant did not describe the items to be seized as knives although they were described to the magistrate in the officer's affidavit as knives. To so hold would establish a hyper-technical constitutional rule for warrants and would tend to cause law enforcement personnel to not seek warrants when our constitutional policy has always been to encourage warrants.

In furtherance of the constitutional policy of encouraging search warrants this court has in doubtful or marginal cases sustained a search under a warrant where without a warrant the search would fall. As stated by the Court in *U. S. v. Ventresca,* 380 U. S. 102 (1965), at page 108:

> "Technical requirements of elaborate specificity once exacted under common law pleadings have no place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

See *Harris v. U. S.,* 331 U. S. 145 (1947).

The "Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract . . . Technical requirements of elaborate

specificity . . . have no place in this area." *U. S. v. Nolan*, 413 F.2d 850 (6th Cir. 1969) at page 854.

Our courts have consistently rejected such highly technical all or nothing approaches to search warrants as Petitioner suggests. To properly resolve this question, it should be remembered that the Fourth Amendment only condemns unreasonable searches, and what is a reasonable search cannot be determined by any fixed formula, but must be determined from all the facts and circumstances of each case. Even in warrant searches where the place to be searched or the things to be seized are perhaps not fully described, the courts have not hesitated to go beyond technical warrant requirements and uphold the search if otherwise reasonable. *U. S. v. Rabinowitz*, 339 U. S. 56 (1950); *Ludwig v. Wainwright*, 434 F.2d 1104 (5th Cir. 1970); *Gurleski v. U. S.*, 405 F.2d 253 (5th Cir. 1968); *U. S. v. Alloway*, 397 F. 2d 105 (6th Cir. 1968).

The courts have considered a general description of "instrumentalities" of the particular crime to be a sufficient constitutional description to seize items constituting instruments of the crime, although there was no specific description of the items. *Harried v. U. S.* 389 F.2d 281 (D. C. Cir. 1967); *U. S. v. Robinson*, 287 F. Supp. 245 (N. D. Ind. 1968). A pair of shoes were found to be "instruments of the crime" even though not specifically described in the warrant. *U. S. v. Guido*, 251 F.2d 1 (7th Cir. 1958).

Respondent submits that the "implements" description in the warrant under attack sufficiently described the times to constitutionally authorize the seizure of the two knives. The knives were instruments of the crime, were lawfully seized, and were admissible in evidence.

The courts have also held that items not described even in a general way in the warrant may nevertheless be seized under such warrants if the items constitute fruits, instrumentalities or evidence of a crime. *Maryland Penitentiary v. Hayden*, 387 U. S. 294 (1967); *Harris v. U. S.*, 331 U. S. 145 (1947); *Johnson v. U. S.*, 293 F.2d 539 (D. C. Cir. 1961), cert. denied 375 U. S. 888; *Ludwig v. Wainwright*, supra; *U. S. v. Nolan*, 416 F.2d 588 (10th Cir. 1969); *U. S. v. Munroe*, 421 F. 2d 644 (5th Cir. 1970) cert. denied 400 U.S. 851; *U. S. v. Tranquillo*, 330 F. Supp. 871, (M. D. Fla. 1971).

Being instruments of the crime of rape, the knives were also properly seized and admissible even if they had not been described in the warrant even in a general way.

In determining the constitutionality and reasonableness of a search pursuant to a warrant, the courts have also considered matters outside the specific wording of the warrant itself. Courts have considered such things as the information contained in the affidavit on which the warrant is based, the information available to the officer executing the

warrant, the good faith of the officer executing the warrant, and the manner in which the warrant was actually executed and the seizure made. See for examples *U. S. v. Melancon*, 462 F. 2d 82 (5th Cir. 1972); *U. S. v. DePugh*, 452 F. 2d 915 (10th Cir. 1971); Hamilton v. U. S., 433 F. 2d 526 (D.C. Cir. 1970), cert. denied 400 U.S. 944; *U. S. v. Hassell*, 427 F. 2d 548 (6th Cir. 1970); *U. S. v. Munroe*, 421 F. 2d 644 (5th Cir. 1970), cert. denied 400 U. S. 851; *Harried v. U. S.*, 389 F. 2d 281 (D. C. Cir. 1967); *U. S. v. Gomez*, 42 FRD 347 (1967); *Kenny v. U. S.*, 157 F. 2d 442 (D. C. 1946); *Vinto Products Co. v. Goddard*, 43 F. 2d 399 (D. C. Minn. 1930); *U. S. v. Curwood*, 338 F. Supp. 1104 (D. Mass. 1972); *U. S. v. Tranquillo*, 330 F. Supp. 871 (M. D. Fla. 1971).

When reviewing all of the facts and circumstances surrounding this search and seizure, it should be concluded that the search was not an unreasonable search and that the seizure and admission into evidence of the two knives did not violate Petitioner's constitutional rights under the Fourth or Fourteenth Amendments to the United States Constitution.

The affidavit of Officer Cranford established probable cause and specifically described the place within the house to be searched. The affidavit also specifically named the items to be seized as "knives". Pursuant to that affidavit, a neutral magistrate issued

a search warrant to search the premises described in the affidavit and to seize implements kept for the purpose of aiding in the commission of the offense of rape, such implements, having been described in the officer's affidavit as "knives".

Armed with the warrant, Officer Cranford, within thirty minutes, went to the premises and made a search of the dresser drawer in the bedroom named in the affidavit and found and seized two knives. The officer searched only that place and made no general or exploratory search. The knives were "implements" of the crime of rape, and the description in the warrant was sufficient to authorize the seizure of the knives as "implements" of the crime.

Further, under all the circumstances, including the warrant, the affidavit by the officer, the limited nature of the search and the information available to the officer at the time of the search, it follows that the search and seizure of the knives was pursuant to a valid search warrant, was made in good faith by the officer, was a reasonable search and seizure, and did not unconstitutionally invade Petitioner's privacy.

Regarding invasion of privacy, Petitioner was not present at the time of the search and although he was present on the premises previously when he was arrested, Respondent submits that Petitioner has failed to demonstrate sufficient standing to even question the search of the premises or the seizure of the knives.

Respondent further suggests that had this search been conducted by the officer at the time of Petitioner's arrest that the officer could have constitutionally seized the knives without a warrant as incident to Petitioner's lawful arrest. Assuming the seizure would have been proper incident to Petitioner's lawful arrest, the subsequent search and seizure pursuant to a search warrant should not be found unconstitutional because of an alleged lack of specific description of the items to be seized. *U. S. v. Rabinowitz,* 339 U. S. 56 (1950); *Harris v. U. S.* 331 U. S. 145 (1947); *U. S. v. Robinson,* 287 F. Supp. 245 (N. D. Ind. 1968); *U. S. v. Beigel,* 254 F. Supp. 923 (S. D. N.Y. 1966), aff'd 370 F.2d 751, cert. denied. 387 U. S. 930.

The warrant was valid, and the surrounding circumstances show a reasonable search pursuant to a warrant based upon probable cause and issued by a neutral magistrate. The constitutional requirements were satisfied and the search and the seizure were constitutionally permissible.

Petitioner has shown no error or constitutional dimensions that would call for reversal of his rape conviction.

CONCLUSION

For the reasons above stated, Respondent says there was no denial of Petitioner's constitutional rights. The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on the _____ day of August, 1974, I mailed copies of Respondent's Brief in Opposition to: Mr. Malcolm Dade, Attorney at Law, 1620 Fidelity Union Tower, Dallas, Texas 75201.

GILBERT J. PENA
Assistant Attorney General

(date)